No. 20-CV-099-TCF

In the
District of Columbia Court of Appeals

LIBERTE CHEN

Plaintiff-Appellant,

v.

NEW YORK MAIL, NEW YORK MAIL 401(K) PLAN, NEW YORK MAIL 401(K) ADMINISTRATIVE COMMITTEE, KING WESTLEY, SAMANTHA ORTIZ, AND LABRON HASTINGS, ANDREWS RECORD-KEEPING, INC., ANDREWS INVESTMENT COMPANY, AND ALINA OXMIX COMEY

Defendant-Appellee.

Appeal from the
United States District Court for the District of Columbia
Civil Action No.: 20-CV-099-TCF
The Honorable Thomas C. Farnam

BRIEF OF APPELLANT

Team # 7

Counsel for Plaintiff-Appellant

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[1] Authorities upon which the Appellant chiefly relies are marked with asterisks.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction of the case docketed as No. 20-cv-099-TCF pursuant to 28 U.S.C §1332(a) because Petitioner and respondents are citizens of different states—Petitioner is a resident of Washington D.C and both Respondents

principal place of business is in New York—and the amount in controversy exceeds $75,000 as Petitioner is seeking to recover $537,201.54 from Respondents.

This Court has jurisdiction over the current appeal under 28 U.S.C. §1291 due to the District Court granting a Respondents motion for summary judgment. Motion for summary judgment is an appealable final decision. *See Catlin v. United States*, 324 U.S. 229 (1945) (A final decision is one that concludes the case on the merits and leaves nothing for the parties to litigate.) The District Court order affectively ended the parties' ability to litigate the present case when it held that Petitioner did not bring suit in a timely manner.

ISSUES PRESENTED

I. Whether the Plan's time limitation in Section 12 is enforceable and requires that the lawsuit be dismissed as untimely?

II. Whether the District Court erred in finding that the complaint failed to plead with sufficient particularity that the Mail Defendants breached any fiduciary responsibilities under ERISA, and that the AIC Defendants were not fiduciaries?

STANDARD OF REVIEW

An appeal from a grant of a motion for summary judgment is reviewed *de novo*, applying the same legal standard that was used by the district court. *Custer v. Murphy Oil USA, Inc.*, 503 F.3d 415, 418 (5th Cir. 2007). Under Federal Rules

of Civil Procedure 56, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56©. A "material" fact is a fact that might affect the outcome of a party's case. *Helton v. AT & T, Inc.*, 805 F.Supp.2d 223, 227 (E.D. Va. 2011). In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the non-moving party. *Id.*

STATEMENT OF THE CASE

The case before the Court is here on appeal from the United States District Court of the District of Columbia involving claims for failure to provide proper notice of a new time limitation and breach of fiduciary duties under ERISA. Chen, Petitioner, is employed by The New York Mail ("The Mail") and participates in The Mail's 401(k) Plan ("The Plan"). The Mail is the named fiduciary on the Plan and hired Andrews Record-Keeping, Inc ("ARK") to provide record-keeping services.

In March 2020, ARK hourly employees went on strike resulting in untrained professionals overseeing participants' investments. ARK filled the positions temporarily with higher-up executives and salary employees. Petitioner contacted ARK through the phone line on March 15, 2020. She requested her investments be moved over to riskier stock as she believed it would result in a large return. An

ARK employee took this request but failed to ever pass it on to Andrews Investing Company ("AIC") in violation of ARK's contractual obligations. Chen attempted to cure the issue with ARK on numerous occasions but could never get ARK to respond. On May 31, 2020, ARK sent a letter to Chen stating that ARK could not cure the loss of $537,201.54 she would have earned if ARK followed proper protocol.

Chen filed suit on December 15, 2020, against The Mail and AIC Defendants seeking equitable relief to remedy the breach of the Defendant's fiduciary duties under 29 U.S.C. § 1104(a). *Chen v. New York Mail et al.*, No. 20-cv-099-TCF, 5-6 (D.C. 2020). The Mail Defendants and AIC defendants filed Motions to Dismiss on December 17, 2020, on the grounds the complaint was time-barred, the Mail did not breach any fiduciary duties, and under the Agreement, AIC Defendants are not fiduciaries. *Id.* at 1. The District Court granted both Defendants' Motion for Summary Judgment. Chen appeals to the present Court. *Id.*

The issues on appeal are as follows: whether the Plan's time limitation is enforceable barring the present action and whether the Petitioner plead with sufficient particularity that the Mail breached its fiduciary duty under ERISA, and if AIC should be considered fiduciaries. The Petitioner asks this Court to vacate the District Court's finding that Section 12 of the Agreement is enforceable due to

the lack of proper notice of the new Statute of Limitations provisions. Furthermore, the Petitioner asks the Court to reverse the District Court's finding that Respondents did not breach any fiduciaries duties as this finding goes against the plain language of 29 U.S.C. § 1104(a); §1104(c)(1)(A) and persuasive case law.

STATEMENT OF FACTS[2]

Chen is a reporter for The Mail and has been working on an indefinite assignment, in Washing D.C., since 2017. *Id.* at 2. The Mail provides its employees a 401(k) Plan that allows employees to manage and control their investments in various funds, according to ERISA 404©. *Id.* The Mail established an Administrative Committee whose sole role was to oversee the Plan's management. *Id.* Together the Mail and the Administrative committee make up "the Mail Defendants" and are named fiduciaries. *Id.*

In 2001, The Mail Defendants were not satisfied with the then-record company's service and began searching for a new one. *Id.* The administrative committee hired a financial advisor to guide the selection process and ultimately selected ARK, a wholly-owned subsidiary of AIC, to be the new record-keeping company for the Plan. *Id.* The Administrative Committee annually reviewed ARK service by sending out a survey to Plan participants and reviewed the responses

[2] Unless otherwise stated, all facts and procedure come from Chen v. New York Mail et al., No. 20-cv-099-TCF (D.C. 2020).

with ARK and AIC (here forward known as "AIC Defendants"). *Id.* at 3. In a typical year, the survey responses never exceeded 10% of the Plan's participants, and the negative feedback never exceeded 1% of the responses received. *Id.*

The Mail Defendants and the AIC defendants negotiated an Administrative Services Agreement ("Agreement"), which laid out the parties' relationship expectations. *Id.* Relevant sections of the Agreement include Section 5, Section 8, Section 10, and Section 12. Section 5 requires AIC Defendants to provide the best execution of management possible and requires ARK to transmit its records to AIC to make the changes in individual Plans, per participants' request, in a timely manner. *Id.* Section 8 and Section 10 speak to the parties' fiduciary status stating that, while the Mail Defendants are fiduciaries under ERISA, the AIC Defendants are not regarded as fiduciaries. *Id.* at 3-4. Finally, Section 12 establishes the statute of limitations to bring a claim against the Plan for benefits or management is within six months of the date the Plan issues a final determination. *Id.* at 4. In 2018 Section 12 was amended into the Agreement, but the Plan participants did not receive notice of this amendment until April 30, 2020. *Id.*

In March 2020, ARK's hourly employees, who manage the phone line that records Plan participant's request, went on strike. *Id.* This strike lasted for approximately three months. *Id.* ARK decided to fill the empty rolls with ARK executives and other salaried employees for the strike duration. *Id.* The Mail was

aware of ARK's solution to the strike as The Mail reported on the strike's status to its readers. *Id.* ARK fill-in employees received no additional training, and neither of the Defendants added additional oversight to make up for the lack of training.

Chen takes advantage of The Mail's 401(k) Plan and prudently oversees her account due to her financial savviness. Due to this knowledge, Chen predicted that the Global Pandemic would result in a drastic drop in stock followed by a "once in a lifetime" investment opportunity. *Id.* In hopes to cash in on this opportunity, Chen contacted ARK on March 15, 2020, and spoke with Alina Oxmix Comey ("AOC"), a stand-in employee for ARK. *Id.* at 5. Chen instructed AOC to move her account balance to the stock index and the technology stock fund, splitting the balance equally. *Id.* AOC repeated Chen's instructions on a recorded line to ensure AOC heard Chen's request correctly. *Id.* Chen was under the impression that AOC, following proper procedures, reported Chen's instructions to AIC and would be mail confirmation of the trade, but AOC failed to do so. *Id.*

When Chen received her March statement on April 10 and did not see the change in her account, she attempted to contact ARK but could not get through. *Id.* Chen repeated this action in May when she received her April statement, which still reflected no change to her Plan account. *Id.* On May 15, one day after receiving her April statement, Chen sent a letter to ARK demanding the Plan to remedy its failure to comply with her instructions. *Id.* ARK responded on May 31,

apologizing for any errors but declined to cure the problem due to Chen not bringing the issue to the Administrative Committee's attention in a timely manner. *Id.* Had the change been made in Chen's account on March 15, as she had instructed AOC to do, she would have earned $537,201.54. *Id.* Her actual earnings during this time were $692.60. *Id.* In response to ARK's denial letter in May, Chen brought suit.

SUMMARY OF THE ARGUMENT

Section 12 – The statute of limitations, contained in Section 12 of the Plan, should not be enforced and the lawsuit should not be dismissed as untimely. Due to several regulatory violations, committed by the Administrative Committee of the Plan, Section 12 is unenforceable because it unfairly prejudices Ms. Chen.

Several circuits, including the First, Second, Fourth, and Eighth, have concluded that the courts can prevent the enforcement of a provision in a benefits plan if the participant would be prejudiced by enforcement. Such a prejudice can surface in many ways, including after a plan administrator's violation of regulatory requirements regarding a plan's provisions. Here, the Administrative Committee of the Plan committed two regulatory violations, both of which result in prejudice against Ms. Chen.

First, the Plan committee failed to disclose (and notify) Ms. Chen and other plan participants of the addition of a reduced statute of limitations in Section 12.

The Plan was statutorily required to notify plan participants of the amendment within 210 of the close of the plan year in which the amendment was made. The Plan adopted Section 12 in 2018 and did not disclose the change until April 30, 2020, violating 29 CFR Section 2520.104b-1.

Second, the Plan failed to adequately notify Ms. Chen of the Section 12 time limitation in the benefit denial letter that was sent on May 31, 2020. Plan administrators are statutorily required to include relevant information, including time limitations, in benefit denial letters. According to the information available in the record, the Plan did not do so, clearly violating 29 CFR Section 2560.503-1(g)(1)(iv).

Ms. Chen was prejudiced by these regulatory violations because they affect her ability to bring a claim against the Plan. If the Plan had followed the required disclosure procedures, or they had properly informed Ms. Chen of the applicable time limitation in her benefit denial letter, she would have been able to meet the requirements of Section 12 and bring her claim in a timely manner. When a participant is subject to prejudice in cases such as this one, courts have declined to enforce the provision in question. In similar statute of limitations cases, the time limitations has been rendered void and unenforceable. This court should follow the same principles, and render the Plan's time limitation, contained in Section 12, unenforceable.

<u>Mail Defendant's Breach</u> – The Mail breached its duty of prudence due to not stepping in when ARK employees went on strike. The duty of prudence is not a "moment in time" duty, but an ongoing duty that last the duration of the relationship. Therefore, it is not dispositive that the Mail consulted experts and weighed in ARK's efficiency when selecting ARK to be the record keeping company for the Plan. Once the Mail was notified that ARK employees went on strike, the defendants should have begun to oversee ARK response and determine how to best protect the Plan's participants, as any other prudent person would have in this context.

Additionally, the Mail agreed with ARK that the concern of filling the positions quickly and for cheap was essential due to the ongoing Pandemic. While cost is a permissible consideration that does not violate fiduciary duties, ease and convenience of finding replacements is not.

The District Court did not provide any analysis on the Mail's conduct and its breach of general fiduciary duties. Following the language of 29 U.S.C. § 1104(a)(1) it is plain to see that the Mail did not meet the high bar of service ERISA requires of its fiduciaries.

<u>Ms. Chen's pleadings</u> – The District Court improperly relied upon the yearly review process and lack of complaints in the yearly review conclude that the Mail did meet its obligations under the duty to monitor. The duty to monitor must be

evaluated at the time the alleged breach occurred, meaning that the Court is to look at what actions, or inactions, the Mail took during the strike to monitor ARK's actions. At the time of the strike the Mail did not evaluate the performance or the readiness of the fill-in workers nor did it attempt to put a system in place to review the untrained fill-ins. Due to the Mail's lack of monitoring, there was no way for the Mail to determine which employees, like AOC, were failing at their role and needed to be removed. A prudent person in the Mail's position would have also put into place additional oversight procedures for the temporary positions or hired a new record keeping company during this time frame.

It is plain to see that the Plaintiff has plead with sufficient particularity facts that support a breach of fiduciary duty and the duty to monitor.

AIC Defendants – ARK behavior towards Chen is such to make it a functional fiduciary; therefore, ARK must be held accountable for its inactions resulting in Chen's massive loss in fortune. The District Court found that ARK could never be considered a fiduciary due to its service provider status and merely administrative role.

The District Court failed to consider 29 U.S.C. § 1002(21)(A) which requires service providers to be held as functional fiduciaries when they unilateral act outside of the contractual terms and provide no opportunity for the participant to cure the problem. Functional fiduciaries are treated the same as fiduciaries in name and

therefore ARK can and should be held liable for damages under 29 U.S.C. §1104(c)(1)(A) exception to the bar of liability.

ARK contractual obligations were to keep track of the participants request for change in their plans and to then report those changes to AIC. ARK violated this duty, as stipulated in the facts, by taking Chen's request to diversifying their investments and then never passing it on to AIC. Not only was this a violation of ARK's contractual duties but it also serves as a unilateral action against Chen's objection. Chen attempted to reach out to ARK on numerous occasions to rectify this problem and ARK refused. Under 29 U.S.C. § 1002(21)(A) these actions make ARK a functional fiduciary in respect to Chen's investments.

ARGUMENT

I. Summary Judgment is improper because the Plan's time limitation in § 12 is unenforceable. Thus, this lawsuit should not be dismissed as untimely.

Section 12 of the Plan, which includes the relevant statute of limitations, was not properly disclosed to plan participants, beneficiaries, and, namely, Ms. Chen. Further, the Plan failed to include the time limitation in Ms. Chen's benefit denial letter. Ms. Chen was prejudiced by these regulatory violations, and, resultantly, the Plan's statute of limitations should not be enforced, and Plaintiff's claim should not be dismissed as untimely.

A fiduciary has an unyielding duty of loyalty to the beneficiary. *Griggs v. E.I. DuPont de Nemours & Co.,* 237 F.3d 371, 380 (4th Cir. 2001). The duty to disclose material information is the core of a fiduciary's responsibility. Generally, such a duty precludes a fiduciary from making material misrepresentations to the beneficiary. *Id.* For some fiduciaries, this duty extends even further. Specifically, ERISA administrators have a larger fiduciary obligation not to misinform beneficiaries through incomplete disclosures. *Harte v. Bethlehem Steel Corp.,* 214 F.3d 446, 452 (3d Cir. 2000).

A. The Plan failed to properly disclose Section 12 (as required by 29 C.F.R. § 2520.104b-3) to Ms. Chen, and failure to include Section 12 in Ms. Chen's benefit denial letter (as required by 29 C.F.R § 2560.503-1(g)(1)(iv)).

According to 29 C.F.R. § 2520.104b-1, the administrator of an employee benefit plan must disclose certain material, including reports, statements, notices, and other documents, to participants and beneficiaries of that plan at stated times or if certain events occur. Specifically, § 2520.104b-3 requires that a plan administrator furnish a summary of material modifications (SMM), to each plan participant, describing any material modification to the plan. 29 C.F.R. § 2520.104b-1(a). Material modifications include any change in information

required to be included in the summary plan description (SPD) under § 2520.102-3.

The plan administrator must furnish the SMM not later than 210 days after the close of the plan year in which the modification or change was adopted. *Id.* A SMM need not be furnished separately if the changes are described in an SPD in a timely fashion. 29 C.F.R. § 2520.104b-1(b). Essentially, a material modification must be communicated, through either an SPD or an SMM, to each plan participant within 210 days of the close of the plan year in which the change was adopted.

In this case, the Plan was amended, to add a statute of limitations in Section 12, in 2018. According to 29 C.F.R. § 2520.102-3(s), an SDP requires the inclusion of "applicable time limits for the redress of claims which are denied in whole or in part." Since the appropriate time limit to bring a claim, or the statute of limitations, is a required component of an SDP, the addition of a shortened statute of limitations is a material modification. Resultantly, to meet the requirements laid out in § 2520.102-3, the Administrative Committee (or Plan Administrator) was required to notify each plan participant of the addition of Section 12 within 210 days.

Since the plan was amended at some point in 2018, the Administrative Committee was required to disclose the material modification to Plan participants (at some point) during 2019. The statute of limitations provision was not

communicated to Plan participants until April 30, 2020, in an SPD. Thus, the Administrative Committee failed to properly disclose the addition of the statute of limitations in Section 12.

Further, according to 29 C.F.R. § 2560.503-1(g)(1)(iv), an adverse benefit determination is required to set forth any plan-imposed time limit for seeking judicial review. As far as the record shows, the adverse benefit letter, that Ms. Chen received from the Plan, included no mention of the required time limit in Section 12. The letter merely informed Ms. Chen that it was too late for anything to be done about her situation. This is a clear violation of § 2560.503-1(g)(1)(iv).

The Defendant may argue that not all of the benefit denial letter is included in the record, as only an excerpt was included in the stipulation of facts. It may very well be the case that the letter contained more and prevalent information that could prove that the Plan did, in fact, comply with the requirements set out before. As far as the record shows, the Defendant did not introduce such evidence. At its best, this creates a genuine dispute of a material fact, rendering summary judgment inappropriate on this issue.

B. Ms. Chen was prejudiced because the Plan's regulatory violations affected her ability to bring a claim.

In cases involving a plan administrator's regulatory violations, courts have tended to require the plaintiff to demonstrate that the violation prejudiced him by

affecting review of his claim. Essentially, a plaintiff must make some showing that a "precisely correct form of notice would have made a difference." *Santana-Diaz v. Metropolitan Life Ins. Co.,* 816 F.3d 172, 183 (1st Cir. 2016) quoting *Recupero v. New England Tel. & Tel. Co.,* 118 F.3d 820, 840 (1st Cir. 1997).

The First, Second, Fourth, and Eighth Circuits have consistently held that a plan participant's detrimental reliance upon, or prejudice flowing from, a faulty disclosure (or nondisclosure) can result in preventing an ERISA plan from enforcing an undisclosed provision. *See Aiken v. Policy Management Sys. Corp.,* 13 F.3d 138, 141-42 (4th Cir. 1993) (holding that the plaintiff must show "significant reliance upon, or possible prejudice flowing from, the faulty plan description." (quoting *Govoni v. Bricklayers, Masons &Plasterers Int'l Union, Local No. 5 Pension Fund,* 732 F.2d 250, 252 (1st Cir. 1984); *Hart v. Anderson*, 671 F.2d 492 (2d Cir. 1981) (holding that limitation on actions was only enforceable where participant was properly notified on the shortened period); Dodson *v. Woodmen of the World Life Ins. Soc'y,* 109 F.3d 436 (8th Cir. 1997) (holding that new time limit for filing a claim for benefits with a plan must be properly disclosed). In *Estate of Ritzer v. National Org. of Indus., Trade Unions Ins. Trust Fund Hosp., Medical, Surgical Health Benedit,* 822 F.Supp. 951, 954 (E.D.N.Y. 1993), the court held that a plaintiff need not show that they in fact read and relied upon a faulty disclosure in order to prevent an ERISA plan from

enforcing an undisclosed provision. A plaintiff must only show that there was a "high probability" that the plaintiff had been prejudiced by the faulty disclosure. *Id.*

In this case, not only did Ms. Chen, and the other Plan participants, receive a faulty disclosure, they received that faulty disclosure nearly two years after Section 12 was added to the Plan. It is clear that Ms. Chen will be prejudiced by the faulty (and complete lack of) disclosure that she received from the Plan, as the Plan now seeks to use the addition of Section 12 to their advantage by barring Ms. Chen's claim entirely. The correct form of notice, through an SMM, as required by § 2520.104b-3, would have given Ms. Chen an additional year of time to become current with the Plan's new statute of limitations.

While it is not absolutely clear from the record if Ms. Chen had read the updated SPD, the Plan's eventual disclosure of the Section 12 amendment came much too late to expect Ms. Chen to have been knowledgeable on the updated terms. The SPD was not furnished until April 30, 2020, which was months after the actions in dispute had taken place. Ms. Chen sought redress from the Administrative Committee just two weeks after the new SDP was furnished and received a determination only one month removed from the furnishing. The court, in *Chambless v. Masters, Mates & Pilots Pension Plan*, 571 F.Supp. 1430, 1454 (S.D.N.Y. 1983), said it best: it would certainly be an arbitrary and capricious

action to penalize participants for taking actions contrary to newly adopted requirements without first providing them adequate notice of the new provisions. Fiduciaries of a fund cannot punish participants pursuant to a new rule unless they first take responsible steps to notify them of the new rule. *Id.* In the case at hand, Ms. Chen acted contrarily to a rule that was added to her Plan without her knowledge. The Plan violated the relevant disclosure requirement and didn't notify Ms. Chen until after the actions, leading to this dispute, had occurred. Such a notice should not be deemed adequate.

Prejudice can also be shown in other ways. Namely, a defective denial of benefits letter is *per se* prejudicial. *Santana-Diaz,* 816 F.3d 172 at 183. As mentioned before, under § 2560.503-1(g)(1)(iv), an adverse benefit determination is required to set forth any plan-imposed time limit for seeking judicial review. In *Santana-Diaz*, the First Circuit held that a plan administrator's failure to include the time limit for filing suit in its denial of benefits letter is *per se* prejudicial to the participant. Further, the court went on to hold that the failure to include the time limit in the final denial letter rendered, as a matter of law, the contractual three-year limitations period altogether unenforceable. *Id* at 183.

As far as the record shows, the adverse benefit letter, that Ms. Chen received from the Plan, included no mention of the required time limit in Section 12. The letter merely informed Ms. Chen that it was too late for anything to be done about

her situation. This is a clear violation of § 2560.503-1(g)(1)(iv), and thus, Ms. Chen has been prejudiced by the Plan.

Because Ms. Chen was prejudiced, through the lack of disclosure about the adoption of Section 12 and through the violation of the requirements of benefit denial letters, Ms. Chen's claim should not be dismissed, and Section 12 should not be enforced. At the very least, there is a real dispute as to the contents of the benefit denial letter. This is a material fact that is unquestionably inappropriate for summary judgment. Therefore, this Court should deny the Defendant's motion for summary judgment.

II. The District Court erred in finding that the complaint failed to plead with sufficient particularity that the Mail Defendant's breached any fiduciary responsibilities under ERISA, and that the AIC Defendants were not fiduciaries.

The starting point of all cases claiming breach of ERISA fiduciary duty is "whether the person was acting as a fiduciary when taking the action subject to the complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226, 120 S. Ct. 2143 (2000). ERISA 404(a) imposes the fiduciary duties of loyalty, prudence, and to "act in accordance with the governing plan documents. 29 U.S.C. § 1104(a)(1). The duty of prudence requires that a fiduciary act with "the type of care, skill, prudence, and diligence under the circumstances that a prudent man acting in a like capacity and familiar with such matters would." *Tibble v. Edison Int'l*, 729 F.3d 1110, 1133 (9th

Cir. 2013). The Plaintiff carries the burden to prove that the Defendant breached its fiduciary duty and that breach directly resulted to the loss in the Plaintiff 's Plan. 29 U.S.C. § 1109(a).

A duty to monitor claim cannot survive without an underlying breach of fiduciary duty. *Reinhart v. Lehman Bros. Holdings Inc*., 817 F.3d 56, 68 (2d Cir. 2016). To establish a breach of the duty to monitor, a Plaintiff must show that "additional monitoring of the Plan's holdings would have averted the injury." *In re SunEdison, Inc. ERISA Litig.,* 331 F. Supp. 3d 101, 113 (S.D.N.Y. 2018). *See, also: Marshall v. Northrop Grumman Corp.,* 2017 WL 2930839, at 11 (C.D. Cal. Jan. 30, 2017). Plaintiff cannot use hindsight in showing that additional monitoring would have changed the outcome. The court will look to a reasonable inference from information known by the Defendant at the time of action that failure could occur. *Id* at 115.

A service provider is acting as a fiduciary if it did not merely follow a specific contractual term and if the provider took a unilateral action regarding the management of the plan without the participants having the opportunity to reject the action. *Teets v. Great-West Life & Annuity Ins. Co.,* 921 F.3d 1200, 1212 (10th Cir. 2019). Functional fiduciaries are bound to the same duties as named fiduciaries under ERISA, though the scope is limited to the extent of the discretionary control. *Id.* at 1206-07. A fiduciary is not liable for any loss, or breach, which results from

the participants exercise of control of their assets. 29 U.S.C. § 1104©(1)(a). ERISA recognizes an exception to this general liability rule when the participant experiences a blackout period where they are unable to control their account due to the sponsor. *Id.*

In sum, a Plaintiff must establish that a fiduciary acted adversely to what a prudent person would have in that specific context. The prudent person standard is not that of a lay man, but one with knowledge and experience of the actor. ERISA has a few fiduciary duties, but the one at issue is the duty of prudence. A fiduciary breaches the duty of prudence when they do not act with diligence and care in making decision regarding the Plan. Once the Plaintiff establishes that a fiduciary duty was breached, they can assert a claim for failure to monitor. Plaintiff has the burden of showing that at the time the fiduciary acted, it could reasonable be inferred that losses could result from that action and that there were better alternative actions. Finally, a service provider can be deemed a functional fiduciary when they act outside of the contractual obligations and it takes unilateral action which cannot be objected to by the participant. A functional fiduciary is treated no differently than a fiduciary in name with regards to ERISA. There is a statutory bar to liability when the participant is in control of Plan, but ERISA recognizes an exception when the plan provider creates a blackout period where the participant is unable to manage their account.

A. <u>The District Court improperly found that the Mail did not breach any of its fiduciary duties.</u>

The Mail breached its duty of prudence due to not stepping in when ARK employees went on strike. The duty of prudence is not a "moment in time" duty, but an ongoing duty that last the duration of the relationship. Therefore, it is not dispositive that the Mail consulted experts and weighed in ARK's efficiency when selecting ARK to be the record keeping company for the Plan. Once the Mail was notified that ARK employees went on strike, the defendants should have begun to oversee ARK response and determine how to best protect the Plan's participants, as any other prudent person would have in this context. The Mail stipulated that it was aware of the three-month long strike, and in fact wrote numerous stories on it. This shows that the Mail was aware of the conflict welling up at ARK and was on notice that its ongoing duty of care and diligence of oversight was triggered.

Additionally, The Mail agreed with ARK that the concern of filling the positions quickly and for cheap was essential due to the ongoing Pandemic. While cost is a permissible consideration that does not violate fiduciary duties, ease and convenience of finding replacements is not. The Mail is required to put the interest of its employees, the plan's participants, ahead of such factors. Fiduciaries have a duty of loyalty to their beneficiaries, and this duty of loyalty should be the driving factor in determining the Mail's conduct. When the Mail allowed ease to be a large

motivator for poor plan management it breach its fiduciary duties to Chen and other plan participants.

The District Court did not provide any analysis on the Mail's conduct and its breach of general fiduciary duties. Following the language of 29 U.S.C. § 1104(a)(1) it is plain to see that the Mail did not meet the high bar of service ERISA requires of its fiduciaries. Additionally, *Reinhart,* 817 F.3d 56 show that this analysis of general duties and the determination of a breach must occur before the court can begin to examine the claim for failure to monitor.

B. The District Court improperly applied precedent when determining if Ms. Chen plead with sufficient particularity the Mail's breach of duty to monitor ARK during the strike.

Any other fiduciary in the Mail's situation would have put additional oversight procedures in place or have hired a new record keeping company during the strike. It is again stipulated that the Mail was aware that ARK was filling the striker's positions with unqualified executives and other salary employees. A prudent person with the experience of the Mail would have been able to easily infer that such meager replacements with little to no training would result in poor service and potentially substantial problems with Plan management.

The District Court improperly read Marshall as a balancing test for determining when a fiduciary breaches its duty to monitor. Marshall was not laying out a test but showing the type of facts a plaintiff must include in their initial

complaint to survive a motion for Summary Judgment. The Marshall court said factors such as failure to evaluate appointees' performance and failure to remove appointees whose performance was inadequate were enough to survive Summary Judgment. Though these are only example of factors they can be readily applied to the case at hand. The District Court stated that the yearly review process and lack of complaints in the yearly review was enough to relieve the Mail of the duty to monitor, but this is not a correct reading of precedent.

The duty to monitor must be evaluated at the time the alleged breach occurred, meaning that the Court is to look at what actions, or inactions, the Mail took during the strike to monitor ARK's actions. At the time of the strike the Mail did not evaluate the performance or the readiness of the fill-in workers nor did it attempt to put a system in place to review the untrained fill-ins. Due to the Mail's lack of monitoring, there was no way for the Mail to determine which employees, like AOC, were failing at their role and needed to be removed. It would have been minimal effort to resend out the yearly survey a couple weeks after the strike started to hear participants responses on ARKs service. The Mail already had the system in place and the survey made all it would have had to do was send it. This is the bare minimum that should have been done. A prudent person in the Mail's position would have also put into place additional oversight procedures for the temporary positions or hired a new record keeping company during this time frame.

It is plain to see that the Plaintiff has plead with sufficient particularity facts that support a breach of fiduciary duty and the duty to monitor. As in Marshall, when the Plaintiff alleges these facts, the cause of action must survive a motion for summary judgement.

C. The AIC Defendants are functional fiduciaries under 29 U.S.C. § 1002(21)(A) and therefore should be held liable for their conduct.

ARK behavior towards Chen is such to make it a functional fiduciary; therefore, ARK must be held accountable for its inactions resulting in Chen's massive loss in fortune. The District Court found that ARK could never be considered a fiduciary due to its service provider status and merely administrative role. The Court failed to recognize the existence of 29 U.S.C. § 1002(21)(A) and the two prong test it creates for when a service provider acts outside the bounds and turns into a functional fiduciary. By applying §1002(21)(A) it is undisputable that ARK's actions in violation of the contractual obligations and refusal to cure makes it a fiduciary under ERISA.

ARK contractual obligations were to keep track of the participants request for change in their plans and to then report those changes to AIC. ARK violated this duty, as stipulated in the facts, by taking Chen's request to diversifying their investments and then never passing it on to AIC. Not only was this a violation of ARK's contractual duties but it also serves as a unilateral action against Chen's

objection. Chen attempted to reach out to ARK on numerous occasions to rectify this problem and ARK refused. Under 29 U.S.C. § 1002(21)(A) these actions make ARK a functional fiduciary in respect to Chen's investments.

The District Court continued on in dicta to find that even if AIC was found to by a fiduciary, liability was barred under 29 U.S.C. §1104©(1)(A). This is an incorrect reading of the statute. 29 U.S.C. §1104(c)(1)(A) does establish a bar to liability for breach of fiduciary duty when a Plan participant has control over the management and diversification of the assets, but the Court failed to read the exception clause of § 1104(c)(1)(A). The exception clause plainly states that the bar to liability is lifted when actions by the sponsor (or fiduciary) effectively block the participant from exercising control over the account. When this happens, the sponsor can be held liable for the actions or inactions took during that time period. A stipulated fact in the case at hand is the AOC did not convey Chen's request to AIC and by not doing that Chen was blocked from managing the Plan account. Chen attempted to cure this block on numerous occasions as each time was greeted with a roadblock on ARK's behalf. These factors are strong enough to support the notion that ARK was not only acting as a fiduciary but is also able to be held liable for their inactions.

In conclusion, the District Court did not do a proper analysis on the breach of general fiduciary duties. The Mail did not act as a prudent person with the same

experience in the same context would have when they discovered ARK's employees went on strike. The Mail's response was to find the quickest and cheapest replacement for the striking employees and then move on from the issue. The Mail could reasonably infer untrained employees would cause disastrous outcomes for Plan participants but failed to take any action to prevent these issues.

The District Court improperly held that Plaintiff failed to plead with sufficient particularity facts that support a breach of fiduciary duty and the duty to monitor due to the misapplication of *Marshall*. The court analyzed the duty to monitor in the limited capacity of the yearly reviews and failed to recognize that the duty to monitor is an ongoing duty.

Finally, the District Court failed to consider 29 U.S.C. § 1002(21)(A) which requires service providers to be held as functional fiduciaries when they unilateral act outside of the contractual terms and provide no opportunity for the participant to cure the problem. Functional fiduciaries are treated the same as fiduciaries in name and therefore ARK can and should be held liable for damages under 29 U.S.C. §1104(c)(1)(A) exception to the bar of liability.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's ruling of January 18, 2021 and rule:

1. The Plan's time limitation in Section 12 is unenforceable and that this lawsuit should not be dismissed as untimely;
2. The complaint did sufficiently plead that the Mail Defendants breached their fiduciary responsibilities under ERISA; and
3. The AIC Defendants were fiduciaries.

Respectfully Submitted,

_________Team 7______

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